

1705. December 26.

ROBERT DICKIE Maltman in Alloway, *against* MARGARET COWIE and Others.

No 5.

An heir having made himself liable for his predecessor's debt by entering, the creditors were found entitled on his death to confirm themselves executors creditors to him, without taking decree of constitution.

ROBERT DICKIE maltman in Alloway, creditor to John Cowie elder of Mainsbothkenner in the sum of 500 merks and some annualrents thereof, having confirmed himself executor *qua* creditor to John Cowie (who was heir served and executor confirmed to old John his father) without constituting the debt by a sentence against him in his lifetime, THE LORDS sustained process at Dickie's instance against Margaret Cowie and others, as debtors to John Cowie younger; because, young John by entering heir, and confirming himself executor to his father being subjected in his own lifetime to the father's debts; as the Commissary might have decerned him, if alive, to pay the debt, so he might, upon an edict served without objection, and caution found, justly decern one of the father's creditors executor *qua* creditor to the son.

Fol. Dic. v. 1. p. 279. Forbes, p. 58.

1708. January 2.

MR DAVID RAMSAY Writer to the Signet, *against* WILLIAM NAIRN of Dunsinnan, Commissary-clerk of Edinburgh.

No 6.

Two persons, who successively confirmed the same subject as executors creditors within six months of the common debtor's decease, were brought in *pari passu*, the posterior executor paying a proportion of the expenses of the first executor, decerned and confirmed.

WILLIAM NAIRN having, as executor-creditor to Thomas Young, confirmed and got payment of forty bolls bear and malt belonging to him at his decease; Mr David Ramsay, within six months of Young's death, did also confirm himself executor dative *qua* creditor, and pursued Dunsinnan for payment of a proportional part of the price of the subject confirmed, as having an interest therein by doing diligence within the six months, in the terms of the act of sederunt, February 28, 1662.

Alleged for the defender; That he ought to be preferred, in regard he first confirmed the bol's, and the posterior confirmation is null; because, there cannot be two principal testaments, and goods once confirmed can only be pursued for at the instance of other creditors *via actionis* against the executor-creditor confirmed. Nor can there be two distinct executors confirmed upon the same subject, more than there can be two services of heirs; an executor being *hæres in mobilibus*: And the act of sederunt relates only to more executors conjoined in one testament, who are but as *cobæredes*.

Replied for the pursuer; Though two testaments simply dative as to the same subject, or one simply dative, and another wherein the executor is confirmed *qua* creditor, would be inconsistent; two executors creditors may be confirmed upon the same subject, as well as two heirs portioners may be served;

because a simple executor dative is obliged to give up inventory of the defunct's whole goods, and it is good defence to one pursued as vitious intromitter with the defunct's goods, that a third party is confirmed executor dative, albeit the intromitter derive no right from him; whereas an executor *qua* creditor needs only to confirm as much of the defunct's goods and gear as he thinks fit; and his confirmation would not purge vitious intromission, unless the intromitter derive right from him, as is clear from the act of Parliament 1696; for that a creditor by confirming, designs only his own security, and not to represent the defunct. The act of sederunt bringing in all creditors confirming themselves executors within six months of the defunct's decease *pari passu*, is not to be restricted to several executors in one testament, as is clear both from the tenor of the act, and from my Lord Stair and Sir George Mackenzie's Observations thereon, and the analogy of our law in other cases. Doth not the act of Parliament 1661, upon the same ground, bring in apprisers within year and day *pari passu*?

Duplied for the defender; As to the point in controversy, there is no distinction betwixt an executor dative who has the whole office, and an executor creditor; seeing, as to the subject confirmed, both equally represent the defunct. And though different executors creditors may, one after another, confirm different subjects, they cannot confirm one and the same subject; according to the constant practice of the Commissary Court of Edinburgh. The parallel of apprisers or adjudgers within year and day doth not hold, for apprising or adjudication is no title of representation; and two persons may very well have different securities upon the same subject, who could not be different representatives.

THE LORDS found, that the pursuer and defender should come in *pari passu*; the former paying always a proportion of the charges wared out by the latter, as executor-creditor first decerned and confirmed.

Forbes, p. 217.

1737. June 24.

MITCHEL *against* MITCHEL.

AN executor-creditor is but a trustee, as well as a simple executor; but then he is a trustee principally for his own behoof; the law, which never dies, gives him a procuratory *in rem suam*, which is not a simple trust to die with himself, but may be followed forth by his representatives as a *jus quæsitum*. And as a decerniture and confirmation is truly an assignation to the subjects confirmed in security and payment of his debt, there can be no place for a new assignation or confirmation *ad non executâ*, though he die before sentence.

Fol. Dic. v. I. p. 279.

* * * This case is reported by Clerk Home, No 88. p. 3900.; and by Lord Kames, *voce* NEAREST OF KIN.

No 7.

Though an executor-creditor die before sentence there is no place for an executor *ad non executâ*.